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Notes

The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence

by
KOREN WAI WONG-ERVIN*

“A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.”¹

Introduction

Despite the large number of United States Supreme Court cases interpreting the Bill of Rights, the Supreme Court has almost entirely avoided interpreting the Second Amendment. Moreover, since the adoption of the Fourteenth Amendment in 1868, the Court has devoted a substantial portion of its time and caseload to deciding the extent to which the prohibitions of section one encompass the guarantees found in the Bill of Rights.² These decisions, however,

* J.D. Candidate, 1999; B.S. Santa Clara University. I would like to thank Brannon Denning, Professor David Levine, Professor Reuel Schiller, and Michael Stonebreaker for reading numerous drafts and providing many valuable insights. I would also like to thank Professor David Kopel, Don Kates, Danny Gray, and Professors Ash Bhagwat and Calvin Massey for their comments on a final draft of this Note. In addition, my thinking on this subject benefited greatly from attending the Winter 1998 Academics for the Second Amendment conference.

1. U.S. CONST. amend. II. Note that neither the punctuation nor the capitalization of the Second Amendment is uniformly reported. Another version has four commas. Variations in such details were common in the early days of our nation, since documents were hand copied. *See, e.g.*, Letter from Marlene McGuirl, Chief, British-American Law Division, Library of Congress (Oct. 29, 1976).

2. Section One of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

have concentrated on the Bill of Rights to the *exclusion* of the Second and the Third Amendments.³ One can easily understand why the Third Amendment—which provides that “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, not in time of war, but in a manner to be prescribed by law”—has been largely ignored by the Court, but the Second Amendment cannot be as readily regarded as irrelevant in our modern times.

Indeed, the Second Amendment is the source of much modern-day controversy in both political and academic circles.⁴ Nevertheless, the Court has repeatedly denied certiorari on cases which, if decided, could answer basic interpretative questions such as whether the amendment provides an individual or collective right and what type of “arms” are protected under the amendment.⁵ The only case in which the Supreme Court has discussed the right at length is the 1939 decision *United States v. Miller*.⁶ The Court’s principal ruling on the applicability of the Second Amendment to the States is the 1886 case of *Presser v. Illinois*,⁷ which is a pre-incorporation doctrine case. The

privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. Note that the author uses “exclusion” to mean not addressed by the Court, since the Court has held that other provisions of the Bill of Rights, namely the Seventh Amendment, are not incorporated against state action. The Court has never addressed the incorporation of the Second or Third Amendment post-incorporation doctrine. In the 1886 case of *Presser v. Illinois*, 116 U.S. 252 (1886), the Court held that the Second Amendment is not directly applicable to the states. However, this was a pre-incorporation doctrine case.

4. Note the increase in “gun control” debates in contemporary politics and in academic scholarship on the Second Amendment over the last several years. See generally Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

5. See, e.g., *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), cert. denied, 113 S. Ct. 1614 (1993); *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), cert. denied, 498 U.S. 1047 (1991); *Sandridge v. United States*, 520 A.2d 1057 (D.C. 1987), cert. denied, 484 U.S. 868 (1987); *Masters v. State*, 685 S.W.2d 654 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 853 (1985); *Quilici v. Village of Morton Grove*, 696 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), cert. denied, 426 U.S. 948 (1976); *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972), cert. denied, 409 U.S. 1010 (1972); *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), appeal dismissed, 394 U.S. 812 (1969).

6. 307 U.S. 1764 (1939). For an explanation of the lack of Second Amendment cases, see Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 108 (1987) (“Until the twentieth century, the Supreme Court had few occasions to give serious attention to the Second Amendment. The federal government did not regulate firearms, the Bill of Rights had not yet been applied to the states, and the Court only occasionally mentioned the Second Amendment.”).

7. 116 U.S. 252 (1886).

Supreme Court, in the 1833 case of *Barron v. Baltimore*, held that the provisos of the Bill of Rights served as restraints upon the national government only, and were not applicable to the states.⁸ Since ours is a system of "dual sovereignty," whatever restrictions on government actions the Second Amendment provides would apply only to the federal government, absent incorporation through the Due Process Clause of the Fourteenth Amendment. Under the modern incorporation doctrine, as articulated by the Court in *Duncan v. Louisiana*, the Court's inquiry focuses on whether the right at issue is "fundamental to the American scheme of justice."⁹

This may change, however, because during the last week of its 1997 term, the United States Supreme Court decided *Printz v. United States*.¹⁰ While the majority continued its recent trend of resurrecting federalism and the Tenth Amendment¹¹—striking the provision of the Brady Handgun Violence Prevention Act¹² imposing requirements on state law enforcement officers as an unconstitutional violation of the principles of federalism¹³—Justice Thomas wrote a provocative concurrence in which he invited the Court to interpret the substantive right protected by the Second Amendment.¹⁴ Neither party raised the issue of the Second Amendment. The issue in *Printz* concerned the scope of Congress' powers under the Interstate Commerce Clause, and yet Justice Thomas, *sua sponte*, flagged one of the main problems surrounding the amendment, namely the absence of any recent Supreme Court ruling as to the nature of the substantive right protected. Justice Thomas wrote:

Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers

8. 32 U.S. 243 (1833).

9. 391 U.S. 145, 149 (1968).

10. 521 U.S. ___, 117 S. Ct. 2365 (1997).

11. This recent trend began in 1995, with the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). See generally Daniel H. Cole & Carol S. Comer, *Rhetoric, Reality, and the Law of Unfunded Federal Mandates*, 8 STAN. L. & POL'Y REV. 103 (1997); Lynn A. Baker, *Federalism: The Argument From Article V*, 13 GA. ST. U. L. REV. 923 (1997).

12. 18 U.S.C. § 922 (1993). Congress amended the Gun Control Act of 1968, 18 U.S.C. § 921-928 (1968), by enacting the Brady Act, 18 U.S.C. § 922 (1993).

13. The Court, in *Printz*, held that the Act imposed an unconstitutional obligation on state officers to execute federal laws, which is inconsistent with the concept of government that the framers accepted—a system of dual sovereignty. "The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz*, 117 S. Ct. at 2367.

14. See *id.* at 2385.

to Congress, places whole areas outside the reach of Congress' regulatory authority.... The Second Amendment... appears to contain [such] an express limitation on the government's authority.¹⁵

This Note contends that Justice Thomas is right; the time is long overdue for the United States Supreme Court to grant certiorari on a case concerning the meaning of the Second Amendment. The Court has shirked its duty long enough. The Court's role, according to *Marbury v. Madison*,¹⁶ is to interpret the Constitution. This includes fashioning the contours of a right which the Framers thought important enough to place second among the first ten amendments.

Should the Court accept Justice Thomas' invitation and determine whether the Second Amendment protects a personal right to keep and bear arms, the next issue commanding the Court's attention—a question the Court has not addressed at length since the incorporation process began—is whether the Second Amendment protects “the right of the people to keep and bear arms” against state, as well as Federal, infringement.¹⁷ Notice, however, that should the Court hold that the Second Amendment provides only a collective right (that is, a right of the states to have an armed militia free from federal interference), then discussion of whether the right should be incorporated becomes nonsensical since there is no need to incorporate a right which belongs to the states against state action. Only individual rights need be guaranteed against both federal *and* state action.

Part I of this Note sets forth the competing schools of thought as to the nature of the right protected by the Second Amendment, and concludes that the emerging consensus that the right is only an *individual* right is inaccurate. Rather, the right was the result of a political compromise, intending to provide *both* a collective and an individual right. Part II discusses the Bill of Rights, the Fourteenth

15. *Id.* Justice Thomas further wrote:

This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment.... Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms “has justly been considered, as the palladium of the liberties of the republic.”

Id.

16. 5 U.S. 136 (1803).

17. Note that the Court need not fully interpret the scope or nature of the Second Amendment in order to incorporate the right against State action. The First Amendment, for example, was incorporated in the early 1920's before the Court clarified the interpretation of the amendment. In fact, it took the Court another sixty years to flesh out the First Amendment doctrine. Likewise, in *Duncan v. Louisiana*, the Court, while incorporating the right to jury trial in criminal cases, noted that it need not fully define the scope of the right. 391 U.S. 145, 161 (1968).

Amendment, and the incorporation doctrine from historical and doctrinal perspectives. Part III examines the various routes the Court could take to apply Second Amendment protection against state, as well as federal action. Part III also includes: (1) an analysis of the Second Amendment under the current incorporation doctrine; and (2) a critique of the Court's current approach. This article concludes that there is a strong case for incorporating the Second Amendment within the Court's current framework. Part IV envisions what the right might look like if the Court were to determine that the Second Amendment protects a personal right to keep and bear arms. The author proposes two possible tests for judicial review under the Second Amendment: (1) a hybrid test, combining various tests used in the First Amendment jurisprudence; and (2) an "unduly burdensome" test, inquiring into whether a regulation has the purpose or effect of placing a substantial obstacle in the path of an individual seeking to exercise his or her Second Amendment right. The author then applies the two tests to two California Penal Codes, demonstrating that a judicially-enforced Second Amendment would not be "fatal in fact" to all gun control legislation.

I. The Nature and Scope of the Right: Individual, Collective, or Other?

A. Three Main Schools of Thought

"To put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussion—law reviews, casebooks, and other scholarly legal publications."¹⁸ Among those scholars who have written on the Second Amendment, there are at least two, and possibly three, schools of thought: (1) that which views the right as an individual right;¹⁹ (2) that which views the right as a collective right;²⁰ and (3) arguably a third school exists, that which contends that, regardless of the nature of the right in the 18th century, we should ignore the Second Amendment today because of changes in American culture and society.²¹ The individual right and the

18. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639-40 (1989).

19. See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

20. See, e.g., Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. L. REV. 107 (1991).

21. See, e.g., David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991). Note that Williams does not represent a "school of thought" in the sense that the other two views do, since he does

collective right schools of thought, while diametrically opposed as to the nature of the right, do have at least one thing in common: both schools of thought invoke textualist, originalist, and structural approaches of constitutional interpretation.²² In contrast, the third school of thought takes a more prudential approach, viewing the Constitution as an evolving document which should be interpreted in light of the changes in our society.

(1) *An Individual Right*

Under the individual right interpretation, the Second Amendment secures a right to individuals, much like the other rights included in the Bill of Rights. Thus, "the people" of the Second Amendment are the same people as those mentioned in the First Amendment and in other parts of the Bill of Rights. Under the logic of this interpretation, any reading of the amendment that does not provide an individual right is undermined by the very text of the amendment.²³ Thus, civil rights attorney Don Kates reasons that:

[T]o justify an exclusively states right view the following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment.²⁴

In other words, the individual right school of thought argues that the language "the right of the people" that appears throughout the Bill of Rights should be interpreted as meaning the same thing when reading the Second, First or Fourth Amendment. To interpret this identical language differently when reading the Second Amendment could be damaging to the entire Bill of Rights "since, if one 'right of the people' could be held not to apply to individuals, then so could others."²⁵

not have many, if any, adherents.

22. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982). Bobbitt lays out six "modalities" of constitutional argument: textual, historical, structural, doctrinal, prudential, and ethical. See *id.* at 25-28, 9-24, 39-58, 74-92, 93-119. See also Levinson, *supra* note 18, at 643-657 (analyzing the Second Amendment under each of Bobbitt's six "modalities").

23. See Reynolds, *supra* note 4, at 466.

24. Kates, *supra* note 19, at 218.

25. Reynolds, *supra* note 4, at 466. See also Kates, *supra* note 19, at 218; William Van

Those who advocate an individual right also argue that the introductory phrase, "well regulated militia," does not negate the right recognized by the amendment.²⁶ Yale Law School Professor Akhil Amar criticized the states' rights reading as placing too much emphasis on the word "militia" which appears only in the amendment's subordinate clause. The phrase "the people" appears at the core of the amendment. In a 1991 article, Amar argues:

The ultimate right to keep and bear arms belongs to "the people," not to the "states." As the language of the Tenth Amendment shows... when the Constitution means "states" it says so... "[T]he people" at the core of the Second Amendment are the same "people" at the heart of the Preamble and the First Amendment, namely Citizens.²⁷

Brannon Denning added that:

While the preamble to the Second Amendment reflects a faith in the citizen militia and the ability of that institution to serve as a vehicle through which "We the People" could defend ourselves against a tyrannical government, it does not follow that the "right to keep and bear arms" belongs therefore only to "the People" as an undifferentiated mass, and not that group's constituent members.²⁸

Moreover, Amar notes that the word "militia" had a different meaning 200 years ago. "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called 'a select corps' or 'select militia'...."²⁹

A variation to the individual right interpretation, sometimes called the "hybrid interpretation,"³⁰ argues that the amendment protects an individual right, but applies only to ownership and use of firearms suitable for militia or military purposes. The Court seemed to have taken this approach in the 1939 decision of *United States v. Miller*,³¹ where the Court stated that the purpose of the Second

Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1237-38 (1994).

26. See, e.g., Van Alstyne, *supra* note 25, at 1242; Kates, *supra* note 19, at 212.

27. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1166 (1991).

28. Letter from Brannon Denning to the author (May 28, 1998) (on file with author).

29. Amar, *supra* note 27, at 1166. See also Kates, *supra* note 19, at 214-18; David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 623-28 (1986); *Letters From The Federal Farmer* (III, XVIII), in 2 THE COMPLETE ANTI-FEDERALIST 242, 341-42 (H. Storing ed., 1981).

30. See, e.g., Hardy, *supra* note 29, at 561.

31. 307 U.S. 174 (1939).

Amendment is to render possible and assure the continued effectiveness of the militia.³² This is discussed in greater detail in Part IID.

(2) *A Collective Right*

The collective right school of thought argues that the Second Amendment provides only a narrow guarantee for States to maintain organized reserve military units.³³ Those who ascribe to this view criticize the individual right school as blindly focusing on the second half of the amendment—"the right of the people to keep and bear Arms, shall not be infringed"—while largely ignoring the preamble "a well regulated Militia." This school of thought emphasizes that the Second Amendment is the only amendment with a preamble establishing its purpose of preserving national security and civic order through "a well regulated Militia."³⁴ The collective right school also criticizes the individual right school for ignoring the Constitution's treason clause in Article III, Section 3 when they argue that the purpose of the Second Amendment includes armed insurrection.³⁵ Historian Michael Bellesiles contends that:

The context for the amendment was the antifederalist fear that the Constitution diminished state power, particularly in granting Congress authority to "provide for organizing, arming, and disciplining the Militia" (Article I, Section 8). The debates addressing the Second Amendment demonstrate that no one cared about an individual right to bear arms; they were concerned with the fate of the militia. James Madison formulated this amendment as a political response to the anti-federalists, guaranteeing state control of the militia yet promising federal support.³⁶

Bellesiles notes that county probate records (inventories of property after a death) show that gun ownership was the exception in the eighteenth and early nineteenth centuries and that gun ownership did not become common until industrialization, and even then ownership was prevalent only in urban areas. Bellesiles admits that he was "puzzled by the absence of what [he] assumed would be found

32. See *id.* at 178.

33. See, e.g., Henigan, *supra* note 20; Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for Right of Security*, 9 HAMLINE L. REV. 69 (1986); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984).

34. See Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, pp. 62-72; Cress, *supra* note 33, at 22-42; Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); Henigan, *supra* note 20, at 107-29.

35. See Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, J. AM. HIST. 425, 454 (1996).

36. *Id.*

in every record: guns.”³⁷ In other words, contrary to the picture painted by the National Rifle Association and others who favor an individual rights reading of the amendment, gun ownership was not universal, or even close to universal, in the eighteenth century. Bellesiles argues that the common belief that guns are deeply rooted in our nation’s history and psyche is an erroneous belief and that history indicates that “[t]he gun culture grew with the gun industry.”³⁸

Gun control advocate Dennis Henigan reads the Amendment as protecting the states against federal interference with the states’ right to have an armed militia.³⁹ In other words, the right of the people to keep and bear arms includes only those “people” who are members of the state’s militia.⁴⁰ According to Henigan, the only legitimate State militia is the National Guard.⁴¹ Since the National Guard is a *federal* force, however, it is difficult to see how the National Guard protects the states’ right to have an armed militia independent of the national government.⁴² Henigan further argues that an individual rights interpretation is an “insurrectionists theory” that “represents a profoundly dangerous doctrine of unrestrained individual rights which, if adopted by the courts, would threaten the rule of law itself.”⁴³

(3) *A Right Which is Inapplicable in Today’s Society*

A possible third school of thought contends that even if the right is read historically as an individual right, that reading is no longer sensible because of changes in our culture. Indiana University School of Law Professor David C. Williams argues for the necessity of looking closely into the meaning of “the Body of the People” keeping

37. *Id.* at 427. Bellesiles was studying county probate records for a project on the legal and economic evolution of the early American frontier.

38. *Id.* at 426. Bellesiles notes that “[p]robate records are not a perfect source for information,” but that they still provide “much information on common household objects and can be used as a starting point for determining the level of gun ownership.” *Id.* at 428.

An examination of more than a thousand probate records, which listed everything from acreage to broken cups, from the frontiers of northern New England to western Pennsylvania for the years 1765-1790 revealed that only 14 percent of the inventories included firearms; over half of those guns (53 percent) were listed as broken or otherwise dysfunctional.

Id. at 427.

39. See DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA 2 (1995).

40. See Henigan, *supra* note 20, at 108.

41. See HENIGAN ET AL., *supra* note 39, at 2.

42. See Col. Charles S. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994).

43. Henigan, *supra* note 20, at 110.

in mind the tradition of civic republicanism.⁴⁴ Williams contends that:

Steeped in the tradition of civic republicanism, the proponents of the Second Amendment believed that the government and the citizenry should dedicate themselves to the Common Good: a good common to all, shared by all. Of necessity, for a Common Good to exist, however, the citizenry must be sufficiently homogenous to share common interests. In that sense, the citizenry is not a collection of independent individuals but an organic and unified entity. The constitutional right to arms belongs to this body of the people, organized into a universal militia, so that it can resist a corrupt federal government. Violence used by the government for its own selfish ends is tyranny. Violence used by a faction of the people for its own selfish ends is illegitimate rebellion. Violence used by the Body of the People for the Common Good, however, is legitimate revolution.⁴⁵

Wendy Brown, a Women's Studies Professor at University of California at Santa Cruz, argues that the republican right of revolution presupposes a virtuous citizenry, and since we no longer have such a populace, the Second Amendment should no longer be read as guaranteeing an individual right to bear arms.⁴⁶ According to Brown, we should not accept all aspects of the republican ideology which dominated the Framers' time period, and should reject its "offensive elements" such as the sexism and violence suggested by the Second Amendment.⁴⁷

Others argue that the National Guard is the present day "militia" protected by the Amendment.⁴⁸ In other words, the National Guard has become the backbone of the militia leaving the Second Amendment useless. For example, in *Commonwealth v. Davis*,⁴⁹ a Massachusetts state court held that its state constitution, which provided that the people have a right to keep and bear arms for the *common defense*, provided only a collective right.⁵⁰ The Massachusetts court reasoned that the language "for the common defense" referred to service in a broadly based, organized militia. The court also distinguished its constitutional provision from other

44. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 CORNELL L. REV. 879, 881 (1996).

45. *Id.* at 881-82.

46. See Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's Embarrassing Second Amendment*, 99 YALE L.J. 661, 663-65 (1989).

47. *Id.* at 663-64.

48. See HENIGAN ET AL., *supra* note 39, at 2.

49. 343 N.E.2d 847 (1976).

50. Note that this provision of the Massachusetts Constitution is different than the Second Amendment to the United States Constitution; the latter does not include the language "for the common defense." This language was explicitly rejected by the United States Senate when considering the Second Amendment.

state constitutions which do not include the phrase “for the common defense.”⁵¹ With regard to the changes over time, the court noted that the colonists distrusted standing armies and preferred to rely on a militia—consisting primarily of civilians and occasional soldiers—for protection.⁵² Noting that militiamen customarily furnished their own equipment, the court stated that a law forbidding individuals to keep arms that were used in service of the militia would have interfered with its effectiveness and thus offended the Constitution.⁵³ The court also noted that since times have changed with the advent of the National Guard, which is equipped and supported by public funds, the problem addressed by the constitutional provision was no longer of concern.⁵⁴ University of Tennessee Law Professor Glenn Reynolds argues that this reading wholly ignores the fact that the “militia” referred to in the Second Amendment “was to be composed of the entire populace, for only such a body could serve as a check on the government.”⁵⁵ “Indeed, both English and American history had led Americans to be very suspicious of ‘select’ militias. Such bodies, composed of those deemed politically reliable by authorities, had played unfortunate roles in the past, and were regarded with the same suspicion as standing armies.”⁵⁶

In response to Anti-Federalists’ concern over Article I, Section 8, which gives Congress the power to “raise and support armies,” the Federalists argued that the universal armament of individual American people eliminated any concern over this Congressional power.⁵⁷ According to the Federalists, any risk of a federal standing army is countered by the existence of a militia which is dependent upon universal armament. Hamilton wrote:

It is not easy to conceive a possibility that dangers so formidable can assail the whole union as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which

51. *Davis*, 343 N.E.2d at 849.

52. *See id.* at 848.

53. *See id.* at 849.

54. *See id.*

55. Reynolds, *supra* note 4, at 475.

56. *Id.* at 476.

57. *See, e.g.*, NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA (1787). Noah Webster, in the first major Federalist pamphlet, wrote:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops than can be, on any pretense, raised in the United States.

Id. at 43.

ought always to be counted upon as a valuable and powerful auxiliary.⁵⁸

Madison added that a standing army of 25,000 to 30,000 men seeking to oppress the people would be offset by "a militia amounting to near a half million of citizens with arms in their hands, officered by men chosen from among themselves."⁵⁹

(4) *The Second Amendment as a Political Compromise Intended to Provide Both a Collective and an Individual Right*

The divided schools of thought argue that the Second Amendment provides *either* a collective right or an individual right, but history suggests that the framers intended to recognize *both* principles.⁶⁰ Early commentators acknowledged this dual purpose. For example, Revolutionary War veteran, St. George Tucker, who later became a professor of law at the College of William and Mary and a Virginia Supreme Court justice, noted that "[t]he right of self defense is the first law of nature."⁶¹ Tucker also recognized the danger of standing armies ("[w]henever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction").⁶² Similarly, William Rawle, a noted legal scholar who sat in a state convention which ratified the Bill of Rights, divided the Second Amendment into two clauses and discussed each separately:

In the Second Article, it is declared that a well regulated militia is necessary to the security of a free state: a proposition from which few will dissent. Although in actual war, the services of regular

58. THE FEDERALIST NO. 26, at 173-74 (Alexander Hamilton) (Mentor ed. 1961).

59. THE FEDERALIST NO. 46, at 299 (James Madison) (Mentor ed. 1961).

60. See generally David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987) (Hardy explores the origins of the militia concept and of the individual right to bear arms, and the merger of the two concepts which, he argues, lead to the present Second Amendment). See also Hardy, *supra* note 29, at 561 (arguing "in light of the historical evidence, documentation of the intent of the drafters of the Second Amendment and their contemporaries, and the need to maintain a consistent standard of constitutional interpretation, the individual rights approach is the only approach that has any validity").

61. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, WITH REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA 143 (The Lawbook Exchange 1996) (1803).

62. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, WITH NOTES OF REFERENCE OF THE CONSTITUTION AND LAWS 300 (St. George Tucker ed., 1803). Tucker's accomplishments include serving as a colonel in the Virginia militia during the Revolutionary War, serving as one of the delegates (along with Madison and Tench Coxe) to the Annapolis Convention, and publishing a five-volume edition of Blackstone's Commentaries.

troops are confesedly more valuable, yet . . . the militia form the palladium of the country The corollary from the first position is, that the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give Congress a right to disarm the people.⁶³

Similar understandings were later voiced by Justice Joseph Story and legal scholar Thomas Cooley.⁶⁴ Cooley, for example, wrote:

It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But . . . if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.⁶⁵

David Hardy, a staff attorney at the Office of the Solicitor of the United States Department of the Interior, argues that the Second Amendment's militia and its right to bear arms provisions have different origins and theoretical underpinnings which were joined into a single sentence in order to satisfy both schools of thought.⁶⁶ While the militia provision found its primary constituency among conservatives—particularly Virginia's landed gentry—and derived from Classical Republican thought, the individual right to bear arms provision was primarily advanced by the Radical movement—particularly in Pennsylvania and Massachusetts—and had its roots in the English Declaration of Rights and from Enlightenment sources.⁶⁷

One group, influenced by the Classical Republicans, saw the

63. W. RAWLE, A VIEW OF THE CONSTITUTION 125 (2d ed. 1829).

64. See 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746-47 (1833); THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898).

65. COOLEY, *supra* note 64, at 298-99. See generally Hardy, *supra* note 29, at 611-15.

66. See Hardy, *supra* note 60, at 3.

67. See *id.* Hardy asks:

Is it reasonable to assume that John Adams, obsessed with the risk of mob rule, and Thomas Jefferson, who so lightly praised the virtues of frequent revolutions, were of a single mind when it came to popular armaments? When Virginia constitutionalized the principle that a well-regulated militia was necessary to the proper defense of a free state, and Pennsylvania instead guaranteed that the people had a right to bear arms for defense of themselves and the state, was there in fact an identical understanding which motivated each statement?

Id. at 2-3.

establishment of a stable republic that could survive in a hostile environment as the highest priority. For this group, to emphasize citizen's rights *against* such a republic was to place the cart before the horse. The other group, influenced by Enlightenment thought, saw the establishment of the rights of man, around which a free republic or democracy might be construed, as the main priority. A statement, rather than a command, regarding the value of the militia "to a free state" appealed to the first group; a command that the right "of the people" to bear arms shall not be infringed appealed to the second.⁶⁸

B. Supreme Court Doctrine

The Supreme Court has never expressly stated whether the Second Amendment provides a collective, individual, or other right to keep and bear arms. The Court hinted that the Second Amendment provides an individual right in *United States v. Verdugo-Urquidez*.⁶⁹ This case involved the interpretation of the phrase "the people" in the Fourth Amendment. The Court unanimously held that the term "the people" had the same meaning in the Fourth Amendment as it does in the Preamble to the Constitution and in the First, Second, Ninth, and Tenth Amendments.⁷⁰

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people."⁷¹

The first case in which the Supreme Court had the opportunity to interpret the Second Amendment is the 1876 case of *United States v. Cruikshank*.⁷² The Court summarized the charges in *Cruikshank* in the following manner:

The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate . . . citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution

68. *Id.* at 4.

69. 494 U.S. 259 (1990).

70. *See id.* at 265.

71. *Id.*

72. 92 U.S. 542 (1876).

and laws of the United States.”⁷³

Although the central holding of the case concerned the Court’s interpretation of the 1870 Act to Enforce the Right of Citizens of the United States,⁷⁴ the Court noted that the right of the people to keep and bear arms existed prior to the drafting and ratification of the Constitution.⁷⁵ In other words, the right was a natural or inalienable right, and such rights cannot be granted by the Constitution since they naturally belong to each person.⁷⁶ The Court held that since the Second Amendment guaranteed a right of the people to keep and bear arms as against the federal government (i.e., not to be infringed by Congress), the federal government lacked the power to punish a private person’s act which violated the right to keep and bear arms. The Court suggested that citizens had to look to the states for protection against any violation by their fellow citizens of their rights.⁷⁷

The Court directly addressed the meaning of the Second Amendment only once, in the 1939 case *United States v. Miller*.⁷⁸ In *Miller*, the Court unanimously upheld Congressional enactment of the National Firearms Act, making it a crime to possess a sawed-off shotgun without paying a federal tax.⁷⁹ The Court limited its decision, stating only that in the absence of proof that a sawed-off shotgun “has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”⁸⁰ Thus, the question that is left to be answered by the Court is whether the Second Amendment protects an individual right to keep and bear arms that are “part of the ordinary military equipment or could contribute to the common defense.”⁸¹ Commentators who interpret *Miller* as a collective rights ruling are mistaken because the Court specifically stated that “the Militia comprised all males physically capable of acting in concert for the common defense,” who “were expected to appear bearing arms supplied by themselves and of the

73. *Id.* at 548.

74. *See id.* at 546.

75. *See id.* at 553. Such a right “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” *Id.*

76. *See, e.g.,* John Trenchard & Thomas Gordon, *Cato’s Letters*, in *THE ENGLISH LIBERTARIAN HERITAGE* 1720-21 (Daniel L. Jacobson ed., 1965). Trenchard and Gordon argued that men can never give up their natural, inalienable rights—such as the right to self-defense—in exchange for government protection; they are as much a part of a man as his soul or conscience. *See id.*

77. *See Cruikshank*, 92 U.S. at 552.

78. 307 U.S. 174 (1939).

79. *Id.* at 183.

80. *Id.* at 178.

81. *Id.*

kind in common use at the time.”⁸² The Court never mentioned the term “National Guard” in its opinion, “and it remanded for evidence, not that Miller was taking part in an immediately militia related activity, but that he was carrying a *weapon* that was ‘part of the ordinary military equipment or that its use could contribute to the common defense.’”⁸³ Although Justice McReynolds (writing for the Court in *Miller*), did state that the Second Amendment should be interpreted from the point of view of ensuring the efficacy of the militia,⁸⁴ the Court’s opinion is more interesting for its implicit rejection of many of the Government’s arguments that are virtually indistinguishable from the arguments made by members of the collective right school of thought.⁸⁵ Furthermore, *Miller*’s precedential value in future litigation is arguably limited since the argument presented to the Court was one-sided. Only the Government submitted briefs and argued before the Court, and no appearance was made on behalf of the defendants/appellees.⁸⁶

If the Supreme Court interprets the Second Amendment as providing an individual right (whether as part of its dual purpose—to provide both a collective and an individual right—or as its sole purpose), the next issue becomes whether this right applies against the state governments as well as against federal government infringement. In *Miller v. Texas*, the Court confirmed that it had never decided the issue of whether the Second Amendment applies to the States through the Fourteenth Amendment.⁸⁷ Besides some recent dicta suggesting that the Second Amendment *is* incorporated in the Fourteenth Amendment, this case remains the last word on this question by a majority of the Court.⁸⁸

82. *Id.* at 179.

83. Hardy, *supra* note 29, at 561, n.11 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

84. *See Miller*, 307 U.S. at 178 (“With obvious purpose to assure the continuation and render possible the effectiveness of such forces [Militia forces] the declaration and guarantee of the Second Amendment were made.”).

85. *See* Brief for Appellant at 4-5, *United States v. Miller*, 307 U.S. 174 (1939) (“Indeed, the very language of the Amendment regards membership in a ‘well regulated Militia’ as a condition precedent to ‘the right of the People to keep bear arms.’”). *See also* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 974-76 (1996) (showing that the alleged “unanimity” of *Miller*’s application in the lower courts “is largely a function of the lower courts’ less-than-honest treatment of *Miller*’s holding”).

86. *See Miller*, 307 U.S. at 174. Defendants themselves did not even appear before the Supreme Court. Rather than risk an unfavorable outcome in the Supreme Court, the defendants went along their way as they were legally entitled to do so since the trial court quashed the indictment. *See* Denning, *supra* note 85, at 973 n.65.

87. 153 U.S. 535 (1894).

88. “The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in

II. The Bill of Rights, the Fourteenth Amendment, and the Incorporation Doctrine: A Historical and Doctrinal Perspective

A. The Bill of Rights

The ratification of the United States Constitution can be seen as a victory for those members of the constitutional convention who were less suspicious of federal power. The Bill of Rights, however, can be seen as a victory for those members who were more suspicious of federal power and opposed replacing the Articles of Confederation with the new Constitution. Those who were especially fearful of a powerful federal government criticized the lack of a Bill of Rights, claiming that in the absence of any enumeration of individual rights the national government was not prevented from invading the rights of the people.

Many Federalists, including James Madison, believed that a Bill of Rights was not necessary, since the federal government only possessed enumerated, or limited powers.⁸⁹ According to Madison, fear that the federal government would infringe citizens' natural, or inalienable rights was absurd because the national government could not act outside its enumerated powers, that is, it possessed *only* the power given to it explicitly by the Constitution.⁹⁰ The national government was a government of limited powers—limited by the words of the Constitution. Madison feared that enumeration of individual rights would open the door for federal government infringement on rights not explicitly listed in any Bill of Rights.⁹¹ In other words, a Bill of Rights would suggest that the national government possessed implied powers—that is, powers not explicitly granted by the Constitution. After all, what need was there to explicitly prohibit Congress from infringing the right of the people to bear arms if Congress did not have some implied power, not written in the Constitution, to do so? Nowhere in the Constitution did the federal government possess the power to prohibit gun ownership, so there was no need for an Amendment such as the Second Amendment. Nevertheless, those who were most concerned about

the Constitution . . . [such as] the freedom of speech, press, and religion; the right to keep and bear arms" *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (quoting with approval *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) (quoting *Poe*, 367 U.S. at 543).

89. See THE FEDERALIST NO. 46 (James Madison), reprinted in THE FEDERALIST bk. 1, 321-28 (Tudor Publishing Co. 1937); 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 764 (1971).

90. See THE FEDERALIST NO. 46, at 321-28 (James Madison), reprinted in THE FEDERALIST bk. 1, 321-28 (Tudor Publishing Co. 1937).

91. See *id.*

the scope of federal power prevailed and the first ten amendments, later known as the Bill of Rights, were ratified in 1791.

It was widely accepted that the Bill of Rights had only been intended by its drafters to restrain the national government. The Court confirmed this belief in a 1833 decision, *Barron v. Baltimore*,⁹² rejecting Barron's contention that the Fifth Amendment prohibition against the taking of property without just compensation applied to the state as well as the federal government.⁹³ The effect of the ratification of the Fourteenth Amendment turned out not to be the reversal of *Barron*, but rather, selective incorporation.⁹⁴

B. The Fourteenth Amendment

In *Barron v. Baltimore*, Chief Justice Marshall (writing for the majority) stated, in concluding that the Fifth Amendment is not applicable to the states, that the question presented was "of great importance, but not of much difficulty."⁹⁵ According to the Court, the Constitution had been established by the people of the United States "for their own government, and not for the government of the individual state. Each state established a constitution, and, in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated."⁹⁶ In those few instances where the framers envisioned federal intervention in the states' treatment of its citizens, the Constitution explicitly provides that the particular provision applies to the states. Article I, Section 10 for example, provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."⁹⁷ Chief Justice Marshall reasoned that:

Had congress [sic], engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.⁹⁸

"Engaging in the extraordinary occupation"⁹⁹ was exactly what

92. 32 U.S. 243 (1833).

93. See *id.* at 247.

94. Having disabled the "privileges and immunities clause" of the Fourteenth Amendment, for all practical purposes, the Court applied a doctrine of selective incorporation. See, e.g., *Twining v. New Jersey*, 211 U.S. 78 (1908); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Adamson v. California*, 332 U.S. 46 (1947).

95. 32 U.S. 243, 247 (1833).

96. *Id.*

97. U.S. CONST. art. I, § 10, cl. 1.

98. *Barron*, 32 U.S. at 250.

99. *Id.*

the Thirty-Ninth Congress did when it proposed the Fourteenth Amendment.¹⁰⁰ The Fourteenth Amendment, adopted in 1868, states in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁰¹

The meaning of this section of the amendment is unclear and has been the source of much Supreme Court litigation. The first sentence of Section One was meant to grant blacks citizenship, thus overruling the Court's infamous decision in *Dred Scott v. Sanford*,¹⁰² where the Court held that a Negro could not become a "citizen" within the meaning of the Constitution because his "ancestors were imported into this country, and sold as slaves."¹⁰³ Chief Justice Taney, in *Dred Scott*, also stated that if African-Americans were regarded as citizens of the United States, "and entitled to the privileges and immunities of citizens" then "[i]t would give persons of the negro race, who were recognized [sic] as citizens in any one State of the Union, the right . . . to hold public meetings upon political affairs, and to keep and carry arms wherever they went."¹⁰⁴

"The second sentence indicates an intent to protect the freed blacks, as well as others, from abuses of state power."¹⁰⁵ Although it is clear that Congress intended to impose limitations upon the states, the scope of those limitations, "couched in terms such as 'equal protection' and 'due process'" is unclear.¹⁰⁶

In the years since the adoption of the fourteenth amendment, a substantial part of the Supreme Court's workload has been devoted to defining and redefining those terms. One of the more difficult issues considered in that process has been the extent to which the prohibitions of section one encompass the guarantees found in the

100. See Jerold H. Israel, *Selective Incorporation: Revisted*, 71 GEO. L.J. 253, 255 (1982).

101. U.S. CONST. amend. XIV, § 1.

102. 60 U.S. 393 (1856).

103. *Id.* at 403.

104. *Id.* at 416-17.

105. Israel, *supra* note 100, at 256. Although the "one pervading purpose" of the Reconstruction amendments was to guarantee "the freedom of the slave race," the protections afforded were not limited to those of "African decent." Slaughter-House Cases, 83 U.S. 36, 70-72 (1872). Congressional support of the amendment was also concerned with discriminatory actions that southern states had taken against white loyalists, and there was discussion of the equity of protecting "all persons, whether citizens or strangers [i.e., aliens]." R. BERGER, *GOVERNMENT BY JUDICIARY* 217-18 (1977); accord Israel, *supra* note 100, at 256 n.18.

106. Israel, *supra* note 100, at 256.

Bill of Rights—that is, the extent to which the fourteenth amendment imposes upon the states prohibitions identical or similar to those imposed upon the federal government by the Bill of Rights.¹⁰⁷

C. The Incorporation Doctrine

The idea—whose chief advocate was Justice Black—that the “original purpose” of the Fourteenth Amendment was “to guarantee that thereafter no State could deprive its citizens of the privileges and protections of the Bill of Rights”¹⁰⁸ has never been accepted by a majority of the Supreme Court. Instead, the Court has chosen to take the route of *selective* incorporation.

In 1908, the Supreme Court decided *Twining v. New Jersey*.¹⁰⁹ The Court articulated the test for selective incorporation as an inquiry into whether the right in question is a “fundamental principle of liberty and justice which inheres in the very idea of free government.”¹¹⁰ The Court later refined the doctrine in the 1937 case of *Palko v. Connecticut*.¹¹¹

In *Palko*, the defendant was indicted in Fairfield County, Connecticut, for first degree murder. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life.¹¹² Thereafter, the State of Connecticut appealed the jury’s second degree conviction to the Supreme Court of Errors, and the presiding trial judge allowed this appeal.¹¹³ The double jeopardy clause of the Fifth Amendment of the United States Constitution prohibits the federal government from this practice. On appeal, Palko’s second degree murder conviction was reversed and a new trial granted.¹¹⁴ Before the jury was impaneled, and throughout the case, Palko argued that the new trial placed him twice in jeopardy for the same offense and thus violated the Fourteenth Amendment of the United States Constitution.¹¹⁵ The trial court overruled Palko’s objection, and the jury returned a verdict of first degree murder, resulting in the court sentencing Palko to death.¹¹⁶ Palko appealed, arguing that “whatever is forbidden by the Fifth Amendment is

107. *Id.*

108. *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting).

109. 211 U.S. 78 (1908).

110. *Id.* at 106.

111. 302 U.S. 319 (1937).

112. *See id.* at 320-21.

113. *See id.* at 321.

114. *See id.*

115. *See id.* at 322.

116. *See id.*

forbidden by the Fourteenth also.”¹¹⁷

The Supreme Court rejected *Palko*’s argument, holding that there is no general rule that “[w]hatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state.”¹¹⁸ Justice Cardozo, delivering the opinion of the Court, noted that a line divides the Bill of Rights into two categories.¹¹⁹ One group, which includes the First Amendment’s freedom of speech, is incorporated by the Fourteenth Amendment to apply against state abridgment. The other group, which includes the Seventh Amendment right to jury trial in civil cases at common law where the value in controversy exceeds twenty dollars, is not incorporated by the Fourteenth Amendment. The Court ruled that trial by jury in civil cases may be modified by a state or abolished altogether.¹²⁰ In comparing and contrasting the first eight amendments Cardozo explained:

In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.¹²¹

Cardozo reasoned that although the rights protected by the Fifth, Sixth, and Seventh Amendments “may have value and importance . . . they are not of the very essence of a scheme of ordered liberty.”¹²² Moreover, “[t]o abolish them is not to violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”¹²³ According to the Court, “[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them [the rights protected by the Fifth, Sixth, and Seventh Amendments].”¹²⁴

Since *Palko*, the Supreme Court has changed the test, shifting the inquiry from whether rejecting incorporation of a right would “violate those ‘fundamental principles of liberty and justice which lie at the

117. *Id.*

118. *Id.* at 323. The Court reversed *Palko* on this precise point in *Benton v. Maryland*, holding that protection against double jeopardy is so fundamental that it must be incorporated. 395 U.S. 784 (1969).

119. See *Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

120. See *id.* at 324. Note that at this time (1937), the Court had not yet incorporated the Sixth Amendment (right to jury trial for criminal cases). The Sixth Amendment was incorporated in *Duncan v. Louisiana*. 391 U.S. 145 (1968).

121. *Palko*, 302 U.S. at 324-25.

122. *Id.* at 325.

123. *Id.*

124. *Id.*

base of all our civil and political institutions'"¹²⁵ to whether the right is "fundamental to the American scheme of justice."¹²⁶

Under the incorporation test, the Supreme Court has incorporated virtually the entire Bill of Rights. All of the rights which the Court has incorporated have been held to the precise meaning when applied against a state as when applied against the federal government, that is, the right is said to be incorporated "jot-for-jot." The only exceptions are the grand jury clause, the Seventh Amendment, and non-unanimous jury verdicts.¹²⁷

D. Intent of the Framers and Its Role in Incorporation

In incorporating several of the Bill of Rights' freedoms into the Fourteenth Amendment, the Court has specifically relied on the intent of the framers.¹²⁸ Admittedly, there are difficulties with original intent, such as ascertaining the intention of a collective decision making body,¹²⁹ determining "whether a provision establishes specific conceptions or general concepts";¹³⁰ extrapolating the framers' "intent" with respect to new problems or "old problems in dramatically changed circumstances";¹³¹ and the possibility that "the framers intended to delegate to people in the future the power to make decisions about what the provision means in the particular circumstances."¹³² Nevertheless, the Court has stated that "[i]t is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed the instrument."¹³³ In *South Carolina v. United States*, the Court noted that "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."¹³⁴ Likewise, the Senate Judiciary Committee of the Forty-Second Congress noted that "[i]n construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted

125. *Id.* at 328 (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

126. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

127. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that while the Sixth Amendment requires federal juries be unanimous in criminal convictions, incorporation of the Amendment does not require state convictions by unanimous verdicts).

128. *See, e.g., Duncan*, 406 U.S. at 151, 156, 160.

129. *See* STONE ET AL., CONSTITUTIONAL LAW 43 (3d ed. 1996).

130. *Id.* at 42.

131. *Id.* at 43.

132. *Id.* at 42.

133. *Ex Parte Bain*, 121 U.S. 1, 12 (1887).

134. 199 U.S. 437, 448 (1905).

it."¹³⁵

III. Incorporation of the Second Amendment Under the Modern Doctrine

"The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."¹³⁶

Since the process of incorporation began, the Court has considered incorporation of all of the first eight amendments except the Third Amendment, the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment, and the Second Amendment. This section examines the feasibility of incorporating the Second Amendment.

A. Incorporation Options

The Supreme Court could apply the Second Amendment to the states through at least three different means. Under the first method, and probably most consistent with the intention of the drafters of the Fourteenth Amendment, the Court could hold that the Second Amendment directly applies to the states through the privileges and immunities clause of the Fourteenth Amendment.¹³⁷ Litigants before the Supreme Court should argue this theory of incorporation as an alternative theory, as it is the least plausible means under which the Court is likely to rule that the Second Amendment applies to the states. Starting with the *Slaughter-House Cases*, the Court rendered the privileges and immunities clause of the Fourteenth Amendment impotent for all practical purposes except preventing states from discriminating against African-American citizens.¹³⁸ Moreover, if the Court steps up to settle the controversy and hold that the Second Amendment guarantees an *individual* right to keep and bear arms which is also applicable to the states, it is highly unlikely that the

135. Report No. 21, Senate Judiciary Committee, 42d Cong., 2d Sess. 2 (25 Jan. 1872).

136. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

137. See, e.g., Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (arguing that the Fourteenth Amendment applies the first eight amendments to the states, and that John Bingham, the principal author of the Fourteenth Amendment, intended that the effect of the amendment be the incorporation of the Bill of Rights against the state governments).

138. 83 U.S. 36, 81 (1873) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the privileges or immunities] provision.").

Court would take an unnecessary third controversial step by resurrecting the privileges and immunities clause, a clause which has been dormant for over a hundred years.

A second possible means of applying the Second Amendment against the states is to adopt the broader "penumbra," or "zone of privacy" theory. This approach originated with Justice Douglas in the 1965 right to use contraceptives case, *Griswold v. Connecticut*.¹³⁹ The Court initiated this "zone of privacy" route after it repudiated the use of the due process clauses to protect un-enumerated economic rights (also known as the repudiation of the *Lochner* Era).¹⁴⁰ Perhaps the Court's use of the "penumbra" stemmed from the Court's reluctance to revive substantive due process for un-enumerated, non-economic rights in light of the Court's total repudiation of this method for protecting un-enumerated economic rights. Under this theory:

unenumerated rights protected by the Ninth Amendment could be defined, in part, by reference to the objectives of the other amendments—the First (privacy), the Second (security and self-defense), the Third (protection of home), the Fourth (protection of house and person), the Fifth (protection of life, liberty, and property), and the Tenth ("powers" reserved to the people).¹⁴¹

The Court, however, has been reluctant to use this approach for several reasons, including federalism and judicial activism concerns.

Under the third method, the Court could invoke the current incorporation doctrine to hold that the Second Amendment applies to the states. This is the most likely approach that the Court would adopt, should it hold that the Second Amendment is incorporated through the Fourteenth Amendment. Under this approach, the inquiry turns on whether the "right of the people to keep and bear arms"¹⁴² is "implicit in the concept of ordered liberty."¹⁴³

B. The Modern Incorporation Doctrine

The Court articulated the modern incorporation doctrine in

139. 381 U.S. 479, 484 (1965) (The "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). *Id.*

140. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (invoking the Due Process Clause of the Fourteenth Amendment to invalidate an economic regulation). *See also* *Coppage v. Kansas*, 236 U.S. 1, 35 (1915) (finding the right to contract rooted in "property" as well as "liberty"); *Adair v. United States*, 208 U.S. 161 (1908) (striking a federal law that prohibited interstate railroads from requiring their employees to promise not to join a labor union). Both *Adair* and *Coppage* were overturned during the Court's repudiation of the *Lochner* Era. *See Phelps Dodge v. NLRB*, 313 U.S. 177 (1941).

141. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 170 (1984).

142. U.S. CONST. amend. II.

143. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Duncan v. Louisiana.¹⁴⁴ The test, as stated in *Duncan*, is whether the right is "fundamental to the American [or Anglo-American] scheme of justice."¹⁴⁵ The Court, however, has never clearly indicated the period in history upon which this inquiry should be directed (that is, fundamental at what point in time?). Arguably, the analysis should be focused on 1868 (the year of the adoption of the Fourteenth Amendment) and on the intent of the drafters of the Fourteenth Amendment. The Court, however, has never addressed this crucial question. Furthermore, the Court uses the phrases "American scheme of justice" and "Anglo-American scheme of justice" interchangeably, looking to both Britain and America as if there were no significant differences between "American" and "Anglo-American."¹⁴⁶

In *Duncan v. Louisiana*, Duncan was convicted of simple battery (a misdemeanor in Louisiana), sentenced to sixty days in the county prison, and fined \$150. Duncan appealed, contending that his conviction was unconstitutional because he was denied a jury trial under the Louisiana Constitution which guaranteed jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed.¹⁴⁷ The Supreme Court held that Duncan was entitled to a jury trial under the Sixth and Fourteenth Amendments.¹⁴⁸ The Court's analysis began with the Fourteenth Amendment—"nor shall any state deprive any person of life, liberty, or property, without due process of law" and with the following statement:

In resolving conflicting claims concerning the meaning of this spacious language [the due process clause of the Fourteenth Amendment], the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.¹⁴⁹

Next, the Court noted that it has phrased the test for determining whether a right extended by one of the first eight amendments is also protected against state action by the Fourteenth Amendment in a variety of ways. After listing the various phrases which the Court has used, the Court emphasized the new approach taken by recent incorporation cases: "Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard

144. 391 U.S. 145 (1968).

145. *Id.* at 149.

146. *Id.* at 149, 150 n.14.

147. *See id.* at 146, 151.

148. *See id.* (holding that states must provide criminal defendants the right to trial by jury in non-petty criminal proceedings).

149. *Id.* at 147-48.

was required of a state, if a civilized system could be imagined that would not accord the particular protection."¹⁵⁰ The Court then noted that more recent cases have focused on whether a particular procedure is fundamental, that is, "necessary to an Anglo-American regime of ordered liberty."¹⁵¹

The Court then proceeded to answer whether the right to jury trial is "fundamental" or "necessary to an Anglo-American regime of ordered liberty."¹⁵² First, the Court looked to the history of trial by jury in criminal cases, noting that "jury trial in criminal cases had been in existence and carried impressive credentials traced by many to the Magna Carta"¹⁵³ for several centuries by the time the United States Constitution was written. The "preservation" and "proper operation [of the jury trial in criminal cases] as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689."¹⁵⁴ The Court traced the origins of the jury trial in America to the English colonists, citing Blackstone for historical support.¹⁵⁵

The Court then looked to the constitutions adopted by the original states and found it significant that all of these states guaranteed jury trial.¹⁵⁶ Moreover, the Court noted, every state entering the Union thereafter protected some form of the right to jury trial in criminal cases.¹⁵⁷

The Court went on to note that "[t]hose who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"¹⁵⁸

After stating that "even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice," the Court began the next paragraph noting that the right to a jury trial "continues to receive strong support."¹⁵⁹ The Court lastly noted that the right to jury trial is

150. *Id.* at 149 n.14.

151. *Id.*

152. *Id.* Another way of phrasing the standard is to say that Courts will enforce "values which . . . hav[e] a special importance in the development of individual liberty in American society, whether or not the value [is] one that [is] theoretically necessary in any system of democratic government." 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §15.6, at 423 (1983).

153. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

154. *Id.*

155. *See id.* at 151.

156. *See id.* at 153.

157. *See id.*

158. *Id.* at 154.

159. *Id.*

granted "in order to prevent oppression by the Government."¹⁶⁰ It is not entirely clear whether these last two considerations are actual prongs of the Court's incorporation test, or merely afterthoughts added to buttress their argument for incorporating yet another right. Any prong inquiring whether the right at issue has become the status quo among the states (that is, considering as a factor whether there is "strong support" for the right among the states today) would seem odd in light of the anti-majoritarian purpose of the Bill of Rights.

The Court then addressed Louisiana's contention that even if it must grant jury trials in *serious* criminal cases it need not do the same in cases involving *petty* crimes, such as Duncan's simple battery.¹⁶¹ The Court again looked to history and common law as well as to the intent of the framers.¹⁶² The Court ultimately concluded that it need not articulate an exact line that demarcates when the seriousness of the punishment is enough to require a jury trial. The Court reasoned, that it was satisfied that the crime at issue here (Duncan's simple battery, punishable by two years in prison), is a serious crime and thus Duncan was entitled to jury trial under the Sixth and Fourteenth Amendments.¹⁶³

To summarize, the factors the *Duncan* Court used to determine whether a particular provision of the Bill of Rights should be applied to the states through the Fourteenth Amendment are: (1) whether the right was a part of the Anglo-American tradition; (2) the treatment of the right in state constitutions; (3) popular regard for the right; and (4) the purposes served by the right.

C. Incorporation of the Second Amendment

Under the modern incorporation test, as modified by the Court in the 1968 case *Duncan*, the issue is not limited to whether the right is a "fundamental principle of liberty and justice which inheres in the very idea of free government,"¹⁶⁴ but rather whether the right is "fundamental to the *American* [or Anglo-American] scheme of justice."¹⁶⁵

(1) *The Right to Keep and Bear Arms as Part of the Anglo-American Tradition*

In order to determine whether a right is "fundamental to the

160. *Id.* at 155 (citing *Singer v. United States*, 380 U.S. 24, 31 (1965)).

161. *See id.* at 159.

162. *See id.* at 160.

163. *See id.* at 162.

164. *Twining v. New Jersey*, 211 U.S. 78, 106 (1908).

165. *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968) (emphasis added).

American scheme of justice,"¹⁶⁶ it is important to examine the colonists' "grievances for rights violated in the decade before the war for independence, and the assertion of their rights in the state bill of rights, constitutions, and legislation as well as in newspapers and in writings of the 'founding fathers' of the individual states" since "all are sources of the federal Bill of Rights."¹⁶⁷

Following the Court's analysis in *Duncan* as to whether a right is "fundamental," the first step is to examine the history of the right to keep and bear arms. The Court, in *Duncan*, began its analysis into whether the Sixth Amendment is "fundamental" by stating that it is "sufficient" for the purposes of the incorporation debate "to say that by the time our Constitution was written, jury trial in criminal cases had been in existence . . . in England for several centuries . . ."¹⁶⁸ A similar observation can be made of the right at issue in the Second Amendment.¹⁶⁹ Historian Stephen P. Halbrook wrote, "[s]trongly influenced by the philosophical classics vigorously insisting on their common-law rights, the Americans who participated in the Revolution of 1776 and adopted the Bill of Rights held the individual right to have and use arms against tyranny to be fundamental."¹⁷⁰ In fact, the consensus among American colonists was that universal ownership of arms was a legal duty.¹⁷¹

To an American of the 18th century, firearms ownership was thus not only

commonplace, but a civic duty. He lived—as had his ancestors for generations—under a legal obligation to own arms and be trained in their use. . . . he encountered the unanimous opinion that individual ownership of arms was the sole security and distinction of a modern republic, and public disarmament the hallmark of tyranny.¹⁷²

For example, the militia laws of New Plymouth colony (which was later incorporated into Massachusetts) required "every freeman or other inhabitant of this colony provide for himself and each under him able to bear arms a sufficient musket and serviceable piece for

166. *Id.*

167. STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES at vii (1989).

168. *Duncan*, 391 U.S. at 151.

169. See, e.g., HALBROOK, *supra* note 167, at 55-87.

170. *Id.* at 55.

171. See, e.g., Joyce Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HAST. CONST. L.Q. 285, 288 (1983); 1 W. HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA OF THE LEGISLATURE IN THE YEAR 1619, 127 (1823, reprinted 1969); W. MILLS, ARMS AND MEN 20 (1956).

172. DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 50 (1986).

war with bandeleros.”¹⁷³ This law is typical of the early American statutes.¹⁷⁴ Moreover, Whig political philosophy, which influenced colonial Americans, and was almost universally accepted in the colonies, also “underscored the importance of arms bearing.”¹⁷⁵ One of the earliest Whig writers, Roger Molesworth,¹⁷⁶ wrote:

A Whig is against the raising or keeping up a standing army in time of peace. . . . And therefore the arming and training of all the freeholders of England, as is our undoubted ancient constitution, and consequently is our right; so it is the opinion of most Whigs, that it ought to be put into practice. . . . Were our militia well regulated and firearms substituted in place of bows and arrows we’d need not fear a hundred thousand enemies. . . .¹⁷⁷

Andrew Fletcher, another early Whig widely read among the colonists, also stressed the importance of an armed citizenry:

The subjects formerly had a security for their liberty, by having a sword in their own hands. That security, which is the greatest of all others, is lost, and not only so, but the sword is put into the hand of the King by his power over the Militia. For though as to other things, the constitution be ever so slight, a good militia will always preserve the public security.¹⁷⁸

As mentioned *supra* Part IA2, the word “militia” had a very different meaning in the 18th and 19th centuries.¹⁷⁹

173. WILLIAM BRIGHAM, *THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH* 31 (1836).

174. *See id.* at 84, 184.

175. HARDY, *supra* note 60, at 41.

176. *See id.* at 46.

177. ROGER MOLESWORTH, Introduction, *FRANCO-GALLIA* at xxviii (1721). Molesworth’s writings were found in the libraries of Thomas Jefferson, John Adams, and a number of colonial public libraries. *See* H. TREVOR COLBURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 211, 218-25 (1965).

178. ANDREW FLETCHER, *A DISCOURSE OF GOVERNMENT WITH RELATION TO MILITIAS* (1737) in *SELECTED POLITICAL WRITINGS AND SPEECHES* 1, 10 (David Daiches ed., 1979).

179. *See e.g.*, Amar, *supra* note 27 at 1168 (“Nowadays, it is quite common to speak loosely of the National Guard as ‘the state militia,’ but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today’s Guard, would have been called ‘a select corps’ or ‘select militia’”).

The First Edition of Black’s Law Dictionary, published in 1891, defines the word “militia” as “[t]he body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army.” BLACK’S LAW DICTIONARY 774 (1st ed. 1891). The 1872 version of Bouvier’s Law Dictionary, which was specifically adapted to the Constitution and laws of the United States, defined “militia” as “[t]he military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion.” 2 JOHN BOUVIER, *A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW* 179

The road to the American revolution inspired newspapers to write public appeals to the people to exercise their right to buy arms,¹⁸⁰ moved colonists to stockpile arms,¹⁸¹ and galvanized leaders such as George Washington, George Mason, and Patrick Henry to publicly advocate the armament of the American colonists.¹⁸² As Patrick Henry wrote in his famous speech, "Give me liberty or give me death":

[A] well regulated militia, composed of gentlemen and yeomen, is the natural strength and only security of a free government. . . . That the establishment of such a militia is, at this time, peculiarly necessary. . . .

If we wish to be free—if we mean to preserve inviolate those inestimable privileges, for which we have been so long contending, . . . we must fight! I repeat it, sir, we must fight! An appeal to arms, and to the God of hosts, is all that is left us!¹⁸³

As noted earlier, the Anti-Federalists may have "lost" their objection to the Federal Constitution, but the inclusion of a Bill of Rights can be seen as a victory for those who were more skeptical of the national government.¹⁸⁴ George Mason and Patrick Henry¹⁸⁵—

(1872).

180. An anonymous article defending Boston colonists' vote requesting their fellow citizens to buy arms stated:

Nor is there a person either in or out of Parliament, who has justly stated and proved one single act of that town [Boston], as a public body, to be, we will not say treasonable or seditious, but even at all illegal. . . . For it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of bearing arms is expressly recognized by the Bill of Rights, and who live in a Province where the law requires them to be equipped with arms, etc. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.

BOSTON EVENING POST, April 3, 1769, reprinted in BOSTON UNDER MILITARY RULE, 1768-1769 AS REVEALED IN A JOURNAL OF THE TIMES 61 (ed. Oliver Morton Dickerson 1936).

Likewise, the *New York Journal Supplement* reprinted an article from the *Boston Evening Post* which stated, in part: "It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense" "Boston Under Military Rule" N.Y. J. SUPPLEMENT, April 13, 1769, at 79.

181. See, e.g., 1 W. GORDON, THE HISTORY OF THE RISE, PROGRESS AND ESTABLISHMENT OF THE INDEPENDENCE OF THE UNITED STATES 473 (1770).

182. See, e.g., 1 KATE MASON ROWLAND, THE LIFE OF GEORGE MASON 181-82 (1892); HEZEKIAH NILES, REPUBLICATION OF THE PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 277-80 (1876).

183. NILES, *supra* note 182, at 277-80.

184. Richard Henry Lee and George Mason, both Virginia delegates to the Constitutional Convention, refused to sign the final draft of the Constitution, mainly because of the lack of a Bill of Rights; both walked out of the Convention to organize an opposition. See, e.g., HARDY, *supra* note 172, at 63.

185. Mason authored the Virginia Constitution and Declaration of Rights, and Henry served as patriot orator and wartime governor of Virginia.

both leaders of the Anti-Federalists—stressed the role of the militia and argued that every man had the duty and right to be armed, pointing to the possibility that the national government may either unintentionally or deliberately fail to provide for arming the militia.¹⁸⁶ Similarly, Anti-Federalist Richard Henry Lee insisted that “[t]o preserve liberty, it is essential that the whole body of the people always possess arms.”¹⁸⁷

Federalists such as Madison and Hamilton were not opposed to a bill of rights that explicitly recognized the right to keep and bear arms because of any opposition to this individual right; rather, they opposed a Bill of Rights as unnecessary and dangerous.¹⁸⁸ According to Madison and Hamilton, the Constitution created a federal government of limited delegated powers, and a bill of rights would imply that the federal government possessed certain implied powers not explicitly in the Constitution.¹⁸⁹ Madison, for example, saw the right of the people to bear arms as being one of the advantages “Americans possess over the people of almost every other nation,” which protects the people from misuse of standing armies.¹⁹⁰

Next, the *Duncan* Court looked to the writings of Blackstone to aid its inquiry as to whether the right in question was “fundamental.” Blackstone wrote that the Bill of Rights signified that subjects were entitled to justice in the court, to petition the king, “and, lastly, to the right of having and using arms for self-preservation and defense.”¹⁹¹

Similarly, should the Court decide to focus their inquiry on 1868—the year of passage of the Fourteenth Amendment (as I suggested in *supra* Part IIIB)—there is “ample evidence that the right to keep and bear arms was regarded as equally ‘fundamental’ by those who framed the Fourteenth Amendment (and by the

186. See DAVID ROBERTSON, *DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA* 270, 274 (2d ed. 1805).

187. RICHARD HENRY LEE, *ADDITIONAL LETTERS FROM THE FEDERAL FARMER* 170 (1788).

188. THE FEDERALIST NO. 46, at 321-28 (James Madison), *reprinted in* THE FEDERALIST bk. 1 (Tudor Publishing Co. 1937); THE FEDERALIST NO. 84, at 152-63 (Alexander Hamilton), *reprinted in* THE FEDERALIST bk. 2 (Tudor Publishing Co. 1937).

189. See *id.*

190. THE FEDERALIST NO. 46 (James Madison), *supra* note 188, at 327 (addressing critics’ (of the proposed constitution) claims that one major failure of the proposed constitution was the absence of a prohibition on the national government regarding standing armies). Madison argued that the American “advantage of being armed” ensured against misuse, and made such protection unnecessary. *Id.*

191. BLACKSTONE, *supra* note 62, at 144 (“The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree and such as are allowed by law . . . [and] the natural right of resistance and self-preservation”).

Amendment's intended beneficiaries, the freedmen)."¹⁹² Brannon Denning wrote:

The right to keep and bear arms free from state interference was one of particular interest to freed blacks following the end of the Civil War [during antebellum conventions, many Southern states amended their constitutions to restrict the right to arms to free white men¹⁹³]. During the debates on the Fourteenth Amendment, many Congressmen explicitly mentioned the right to keep and bear arms as one of the "privileges and immunities" of citizenship the Amendment was intended to protect.¹⁹⁴

Likewise, Professor Eric Foner, a leading historian of Reconstruction, wrote, "[i]t is abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure."¹⁹⁵

(2) *The Right To Keep and Bear Arms in State Constitutions*

The Court in *Duncan* considered whether the constitutions of the original states protected the right in question. Between 1776 and 1783, four states adopted bills of rights explicitly recognizing "the right of the people to bear arms," four other states adopted "well regulated militia" guarantees which mandated an armed populace, and the remaining six chose not to expressly enumerate any rights of the people.¹⁹⁶

The Virginia constitution, for example, included:

A declaration of rights made by the representatives of the good

192. Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 756 (1998) (citing AKIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) ("[f]or this theory of a 'reconstructed' Second Amendment, I owe debt of gratitude to the work of Professor Amar whose take on the changes the Fourteenth Amendment wrought on not only the Second Amendment, but on the whole Bill of Rights as well, as part of a forthcoming work . . .").

193. See CRAMER E. CLAYTON, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* 97 (1994); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 659-660 (discussing changes to the Tennessee Constitution).

194. Denning, *supra* note 192, at 756-57 (citing AMAR, *supra* note 192); see generally MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* (1986).

195. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* at 258 (1988).

196. See PA. DEC. OF RIGHTS, Art. XIII (1776) (the people have a right to bear arms for the defense of themselves and the state"); VA. DEC. OF RIGHTS, Art. XIII (1776) (the right of "the body of the people, [to be] trained to Arms"); DEL. DEC. OF RIGHTS, Art. XVIII (1776); MD. DEC. OF RIGHTS, Art. XXV (1776).

people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

That a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty and that in all cases the military should be under strict subordination to and governed by the civil power.¹⁹⁷

Likewise, the Pennsylvania Declaration provided the citizens of Pennsylvania with a broad right to bear arms:

A Declaration of the Rights of the Inhabitants of the State of Pennsylvania

That the people have the right to bear arms for the defense of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.¹⁹⁸

The Massachusetts 1780 bill of rights, drafted by John Adams, went even further:

A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts

The people have a right to keep and to bear arms for the common defense. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority and be governed by it.¹⁹⁹

The national government's equivalent, enacted in 1789,²⁰⁰ must be interpreted in light of the universally known state declarations of the right to arms. One such interpretation views the amendment to the Federal Constitution as a political compromise intended to satisfy the demands of both the militia and the individual right to bear arms

197. VA. CONST. § 15. See also BENJAMIN P. POORE, *THE FEDERAL AND STATE CONSTITUTION, COLONIAL CHARTERS AND OTHER ORGANIC LAW* (1877); JOHN R. BIGELOW, *THE AMERICAN'S OWN BOOK: OR, THE CONSTITUTIONS OF THE SEVERAL STATES IN THE UNION* (1848). Note that for the Virginia Constitution, Thomas Jefferson proposed that "[n]o freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON at 344. The actual words of the Virginia Constitution, adopted by the legislature, were written by George Mason.

198. PA. CONST. ART. XIII

199. MASS. CONST. ART. XVII. See also North Carolina's 1776 Bill of Rights:

That the people have a right to bear arms, for the defense of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be under strict subordination to, and governed by, the civil power. N.C. CONST. ART. XVII.

200. The form of the amendment adopted by the Senate and approved by both houses on September 25, 1789 became the Second Amendment of the Bill of Rights. HALBROOK, *supra* note 141, at 81.

schools of thought (discussed *supra* Part IA4). Nevertheless, the evidence on this particular inquiry is not as conclusive as that of the right to jury trial, where the *Duncan* court found that all of the original states constitutionally guaranteed the right. It is unclear what significance the Court would attribute to the absence, in six states between 1776-1783, of any express enumeration of the rights of the people to keep and bear arms.

(3) *Popular Regard for the Right to Keep and Bear Arms*

The Court, in *Duncan*, also emphasized that the right to "[j]ury trial continues to receive strong support."²⁰¹ At the time *Duncan* was decided, every state guaranteed a right to jury trial in serious criminal cases, and there were no "significant movements underway" to dispense with the right.²⁰² Here, one should pause to note another flaw in the Court's incorporation doctrine, namely the Court's inquiry into the status quo in light of the fact that the Constitution is supposed to be an anti-majoritarian doctrine. Nevertheless, public support for the Second Amendment may not be as strong as the universal endorsement of the right to a jury trial.²⁰³ For example, many members of academia view the Second Amendment as trivial, certainly not as important as the First Amendment right to free speech.²⁰⁴ However, over the last few years, many states have expressed their support of the right to keep and bear arms through the adoption of "right to carry" laws. As of 1996, 31 states allow law-abiding citizens to carry a concealed handgun for personal protection.²⁰⁵ Right to carry laws require eligible persons be granted a permit to carry a handgun after passing a background check and sometimes a firearms safety class.²⁰⁶ If an applicant is rejected, "the burden of proof is on the non-issuing sheriff, police chief, or judge to show that an applicant is either unqualified or a danger to public safety."²⁰⁷

On the other hand, one can argue that America is a dramatically different place than it was in the early colonial times, or even when compared to the early days of our nation. America is not the same

201. *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968).

202. *Id.*

203. For public opinion polls on gun control, see GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 345-49 (1997).

204. See, e.g., Levinson, *supra* note 18, at 639-40.

205. David Kopel, *The Untold Triumph of Concealed-Carry Permits*, July-August 1996 *POL. REV.* 9-11.

206. The exception is Vermont, which does not require a permit at all to carry a concealed firearm.

207. Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 *TENN. L. REV.* 679, 680 (1995).

dangerous uncivilized land filled with threats from wild animals, as well as Indians, French, Dutch, and Spaniards. However, today's threats are equally as menacing, if not more so, and include murderers, thieves, rapists, gang members and others who commit random acts of violence against citizens. After all, it is "fundamental American law" that the police do not have a legal responsibility to provide personal protection to individuals.²⁰⁸ Even if the rationale for the right to keep and bear arms has changed, the situation is still analogous to that in *Duncan* since the rationale for a right to a jury trial in criminal cases has changed. No longer does the jury trial provide the only procedural safeguard to criminal defendants. Additional procedural safeguards have since been enacted; most significantly, the right to counsel. And yet the Court did not allow this shift in the rationale underlying the right to prevent its finding that the right is "fundamental to the [Anglo-] American scheme of justice."²⁰⁹

(4) *The Purpose of the Second Amendment*

Lastly, in concluding that "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause . . . and must therefore be respected by the states,"²¹⁰ the *Duncan* Court considered the purposes served by the right:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action.²¹¹

The Court could make a similar conclusion with regard to the

208. *Warren v. District of Columbia*, 444 A.2d 1, 6 (D.C. 1981). See also *Bowers v. DeVito*, 686 F.2d 61 (7th Cir. 1982) (holding that there are no federal constitutional requirements that state or local agencies provide sufficient police protection); *Calogridis v. City of Mobile*, 475 So. 2d 560 (Ala. 1985); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983); *Davidson v. City of Westminster*, 659 P.2d 894 (Cal. 1982); *Sapp v. City of Tallahassee*, 348 So. 2d 363 (Fla. Dis. Ct. App. 1977); *Keane v. City of Chicago*, 240 N.E.2d 321 (Ill. App.Ct. 1968); *Simpson's Food Fair v. Evansville*, 272 N.E.2d 871 (Ind. App. 1971); *Silver v. City of Minneapolis*, 170 N.W.2d 206 (Minn. 1969); *Wuetrich v. Delia*, 382 A.2d 929, 930 (N.J. Super. Ct. App. Div. 1978); *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1958); *Chapman v. City of Philadelphia*, 434 A.2d 753 (Pa. Super. Co. 1981); *Morris v. Musser*, 478 A.2d 937 (Pa. Commw. Ct. 1984).

209. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

210. *Id.* at 156.

211. *Id.* at 155-56.

Second Amendment. The purpose of the Second Amendment is twofold:

The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation. Such an individual right was a legacy of the English Bill of Rights. This is also plain from American colonial practice, the debates over the Constitution, and state proposals for what was to become the Second Amendment.²¹²

The second and related objective concerned the militia. The coupling of these two objectives has caused great confusion. The customary American militia necessitated an armed public. Both Madison's original version of the amendment and those versions suggested by the states described the militia as either "composed of" or "including" the body of the people.²¹³ A select militia was regarded as little better than a standing army.

In other words, the right to keep and bear arms was considered essential for protection at home and against government tyranny. The Framers divided power to protect citizens' liberty not only by creating three branches within the federal government and splitting power between the federal and state governments, but also by ensuring that the citizenry possessed sufficient military power to offset the military power of the federal government. Justice Story wrote:

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.²¹⁴

Despite criminological research which concludes that allowing mentally sane, law abiding adults to "keep and bear arms" deters crime, thus reducing the number of violent crimes and thefts in America,²¹⁵ there are those, such as Dennis Henigan, who argue that

212. Joyce Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right*, 162 (1994) (citing the proposals of Virginia, New York, North Carolina, and Rhode Island, in *Documentary History of the Constitution* 2:380 at 191, 269, 314).

213. 11 PAPERS OF JAMES MADISON 297 (R. Rutland & C. Hobson eds. 1977).

214. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1890 (Melville M. Bigelow ed., 1891).

215. See, e.g., Kopel, *supra* note 205, at 10. The University of Chicago conducted a comprehensive study which examined crime data for 3,054 counties and found that while concealed-carry reform had little effect in rural counties, in urban counties reform was followed by a substantial reduction in homicide and other violent crimes such as robbery. The researchers "estimated that if all states that did not have concealed carry laws in 1992 adopted such laws, there would be approximately 1,800 fewer murders and 3,000 fewer

an individual right's reading of the amendment "represents a profoundly dangerous doctrine of unrestrained individual rights which, if adopted by the courts, would threaten the rule of law itself."²¹⁶ The *Duncan* Court, however, noted that the jury trial has "its weaknesses and the potential for misuse," but the Court did not allow this to prevent it from incorporating the right.²¹⁷ If the majority of people perceive that a particular constitutional provision is bad public policy, then perhaps that provision should be amended. The Constitution is, however, the supreme law of the land and needs to either be enforced or amended, but not ignored.

IV. A Glance at What the Right Might Look Like

Justice Thomas, in his concurrence in *Printz v. United States*²¹⁸ (quoted in the introduction to this Note), assumed that the Second Amendment would immunize whole areas from federal government regulation: "[t]he Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority."²¹⁹ A majority of the Court, however, has never interpreted any of the individual rights as imposing absolute prohibitions against government action.

This Note argues that should the Court determine that the Second Amendment provides an individual right, the amendment would *not* provide an absolute "right to keep and bear arms." Rather, as many have stated, including Boston University Law Professor Randy E. Barnett and San Francisco attorney Don Kates, the broad individual right view sees the Second Amendment as a right of the people to be treated the same as other rights of the people in the Constitution, that is, subject to reasonable regulation consistent with the amendment's purpose.²²⁰ Thus, to the extent that Justice Thomas' statement that "whole areas" are outside Congressional reach is interpreted as justification for reading the Second Amendment as an absolute right, that interpretation is inconsistent with how the rest of the Constitution has been read. Having decided that the Second Amendment does not provide an absolute right, one question remains: what sort of restrictions should be allowed?

rapes annually." *Id.*; see also Gary Kleck & E. Brett Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIME 249 (1993).

216. Henigan, *supra* note 20, at 110.

217. *Duncan*, 391 U.S. at 156-57.

218. 117 S. Ct. 2365 (1997).

219. *Id.* at 2386 (1997).

220. Randy Barnett & Don Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1142 (1996).

A. Two Possible Tests

Judicial review under the Second Amendment should address at least two separate issues: (1) *who* is protected by the Second Amendment; and (2) the level of scrutiny applicable to legislation limiting the "right to keep and bear arms."

Regarding the first issue, any legislation restricting the rights of felons, minors, or mentally retarded persons to keep or bear arms should be subject to rational basis scrutiny in light of the fact that the Court has refused to treat any of these classifications as suspect or even quasi-suspect.²²¹ Furthermore, with respect to felons, the Court has repeatedly recognized that a legislature may constitutionally deny convicted felons fundamental rights.²²²

In order to address the second issue, it is important to consider both the two-fold purpose of the Second Amendment—protection of self and protection against government tyranny (discussed *supra* Part IIIC4)—and the amendment's "shall not be infringed" language. Although the Court has not interpreted any of the individual rights as imposing absolute prohibitions against government action, the wording of the amendments and the varying levels of protection remain relevant in determining what type of restrictions should be permitted. "The kind of protection that particular rights enshrined in the Bill of Rights receive is not identical. Some are guaranteed in the most absolute and imperative terms."²²³ For example, the First Amendment specifies that "Congress *shall* make *no* law respecting an establishment of religion."²²⁴ In contrast, the Fourth Amendment proscribes only "unreasonable" searches and seizures.²²⁵

Although one possibility includes treating the Second Amendment like the free speech clause of the First Amendment,²²⁶

221. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985).

222. See, e.g., *Lewis v. United States*, 445 U.S. 55, 66 (1980).

223. W. Rumble, *James Madison on the Value of Bills of Rights*, CONSTITUTIONALISM 122, 137 (Pennock and Chapman eds., 1979).

224. U.S. CONST. amend. I (emphasis added).

225. U.S. CONST. amend. IV.

226. There are a number of First Amendment doctrines, including the "prior restraint test," the "*Brandenburg* test," and the overbreadth doctrine. See e.g., *Near v. Minnesota*, 283 U.S. 697, 719 (1931) (holding that under the doctrine of prior restraints, any governmental action that prevents expression from occurring, as distinguished from punishment once it had occurred, is presumptively invalid as a violation of the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that under the *Brandenburg* test, legislation which proscribes speech is unconstitutional unless it is directed to inciting imminent lawless action and is likely to incite or produce such action); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (under the overbreadth doctrine, the government may not achieve its concededly valid purpose by legislation that has an unnecessarily broad reach, that is, punishes protected speech or conduct in its effort to regulate otherwise unprotected expression).

the Second Amendment's mandate "*shall not be infringed*"²²⁷ is arguably a higher standard of protection than the free speech clause's "abridg[e] the freedom of speech."²²⁸ On the other hand, the language of the free exercise clause of the First Amendment—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—is more directly analogous to the Second Amendment's "*shall not be infringed*" prohibition. The text of these two provisions guarantee against any interference whatsoever, suggesting that a version of the free exercise clause's test would serve as a better match than any of the tests in the free speech context.

I propose that the Court adopt one of the following tests: (1) a hybrid test, combining the first prong of the three-part test from *Lemon v. Kurtzman*²²⁹ with the second prong from the free speech jurisprudence,²³⁰ modified somewhat to further the purposes of the Second Amendment—defense of self and family and protection against government tyranny; or (2) a version of the "undue burden" test from *Planned Parenthood v. Casey*.²³¹ The first test would partially treat the Second Amendment like the free exercise clause by considering the similarity in the language, while modifying the test to take into account the unique purposes of the Second Amendment.

Admittedly, the language of the Second Amendment is not particularly similar to the language of the Fourteenth Amendment, which the *Roe* and *Casey* Courts relied on, but the Court did not derive the "undue burden" test from the text of the Fourteenth Amendment. Adopting the "undue burden" test from *Casey* could

227. U.S. CONST. amend. II (emphasis added).

228. U.S. CONST. amend I (emphasis added). The full text of the First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.; see also Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 109 (1997) (arguing that applying the First Amendment "prior restraint test" to the Second Amendment would most likely fail because "the values that would be protected under the Second Amendment have little to do with those that gave rise to the prior restraint standard under the First Amendment; the fear of 'chilling effects' of prior restraints on the exercising of First Amendment rights is hardly applicable to the Second Amendment").

229. 403 U.S. 602, 612-613 (1970) (holding that under the Court's three-fold test, government action is valid only if it satisfies each of the following conditions: (1) it must have a "secular legislative purpose"; (2) "its principal or primary effect must neither advance nor inhibit religion"; and (3) "it must not foster an excessive government entanglement with religion").

230. See, e.g., *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).

231. 505 U.S. 833, 874 (1992).

serve as a meaningful Second Amendment test by focusing the inquiry on the liberty the Founders intended to protect through the Second Amendment. Like the *Casey* test, a Second Amendment undue burden test should take into account the *purpose* and *meaning* of the right at stake.²³²

(1) *The Hybrid Test*

Under the hybrid test, in order to determine whether government action violates the Second Amendment, courts should scrutinize whether the legislation serves: (1) a legitimate purpose not inconsistent with the purposes behind the Second Amendment; and (2) whether the means are narrowly tailored to meet the legitimate purpose.

(2) *The "Undue Burden" Test*

A second option is for the Court to adopt a version of the *Casey* "undue burden" test. Under this test, an undue burden exists, and therefore a provision of law is invalid, if its *purpose or effect* is to place a substantial obstacle in the path of an individual seeking to exercise his or her Second Amendment right.²³³ Thus, the inquiry focuses on whether a regulation has the purpose *or* effect of placing a *substantial obstacle* in the path of an individual seeking to protect him or herself against others and against government tyranny.

Under either of these tests, the author does not suggest that the "right to keep and bear arms" would encompass field artillery, tanks, fighter jets, or bombers. First, the text of the Second Amendment contains limitations such as "the right to *keep* and *bear* arms." Individuals are hardly capable of bearing a tank or bomber. Second, the Second Amendment does not guarantee parity of force. Rather, "the right of the people to keep and bear arms" serves to reduce the chance that the government will become tyrannical by eliminating the government's monopoly on the use of force. The presence of an armed populace significantly raises the costs of a coup d'état.²³⁴ In other words, the Second Amendment does not guarantee equality of

232. The right at stake in *Casey* was a woman's right to have an abortion.

233. See *Casey*, 505 U.S. at 874. The *Casey* Court also stated that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

234. See Daniel D. Polsby & Don. B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237 (1997) (arguing that "a connection exists between the restrictiveness of a country's civilian weapons policy and its ability to commit genocide upon its own people"). The authors discuss the cases of Uganda and Indonesia to "show that the alternative to genocide may be civil war if a genocide target is sufficiently well-armed to fight back." *Id.*

power, but rather that the government will not have a monopoly on the instruments of force.

B. Application of the Tests to Two California Gun Control Statutes

Under either of the author's two proposed tests, judicial enforcement of the Second Amendment would not prohibit any or all gun control legislation. The following two examples illustrate this point:

(1) California Penal Code Section 171(b)

Section 171(b) of the California Penal Code is an example of a statute that would withstand constitutional scrutiny under both of the tests articulated in Part IVA. Section 171(b) prohibits, in part, bringing or possessing any firearm, designated deadly weapons, stun guns, or fixable blade knives with four inch or longer blades within any courthouse or building designated as a courthouse, except when used as evidence, possessed by peace officers, or other designated persons.²³⁵ First, the statute serves a legitimate purpose not inconsistent with the purposes of the Second Amendment. The purpose of section 171(b) includes the protection of judges, attorneys, litigants, witnesses, and other persons present in courts of law and state or local government buildings. Second, the statute is narrowly tailored to meet that purpose because section 171(b) includes numerous exceptions for:

(1) A person who possesses weapons in, or transports weapons into, a court of law to be used as evidence.

(2) (A) A duly appointed peace officer . . . a retired peace officer with authorization to carry concealed weapons . . . a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, or any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer

(5) A person who lawfully resides in, lawfully owns, or is in lawful possession of, that building with respect to those portions of the building that are not owned or leased by the state or local government.²³⁶

Thus, the inclusion of such exceptions serves to limit the application of section 171(b) to accomplish its purpose with sufficient precision.

Likewise, under the "undue burden" test, section 171(b) would be upheld. As the *Casey* Court stated, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself,

235. CAL. PENAL CODE § 171(b) (1997).

236. *Id.*

has the incidental effect [of restricting an individual's right] cannot be enough to invalidate it."²³⁷ Only legislation that imposes an undue burden on the right to keep and bear arms would be unconstitutional. Here, limiting the possession of all weapons, including firearms,²³⁸ in state or local public buildings such as courthouses is not unreasonable, and does not impose an undue burden because individuals are still free to exercise their Second Amendment right with the limited exception of inside public buildings.

(2) *The Roberti-Roos Assault Weapons Control Act of 1989*

The Roberti-Roos Assault Weapons Control Act of 1989 consists of a list of banned guns and a mechanism by which the judiciary is allowed to add guns to the list.²³⁹ The guns on the list are semiautomatic firearms.²⁴⁰ In March of 1998, the California Court of Appeal, in *Kasler v. Lungren*, held that a provision of the act that permitted the judiciary to add to an existing list of banned guns was unconstitutional, finding that the add-on provision violated the separation of powers doctrine, the Due Process Clause (deprived citizens of notice of law), and the Equal Protection Clause, and was also vague.²⁴¹

Under the author's proposed two-prong test, the entire Assault Weapons Control Act is unconstitutional. Under the first prong of the author's first proposed test—whether the legislation serves a purpose not inconsistent with the purposes of the Second Amendment—the act would fail to withstand constitutional scrutiny because the stated legislative purpose is pretextual. The stated purpose of the act is to place restrictions on the use of "assault

237. *Casey*, 505 U.S. at 874.

238. See CAL. PENAL CODE § 171(b).

239. See CAL. PENAL CODE § 12275-12290 (1997).

240. See CAL. PENAL CODE § 12276 (1997). As semiautomatic firearm is described as: The semi in semiautomatic comes from the fact that the energy created by the [firing] of gunpowder, used to force the bullet down the barrel, is diverted away from the shooter. The energy is directed forward, and is used to reload the next cartridge into the firing chamber. Thus, in semiautomatic action firearms the shooter does not need to perform an additional step, such as cocking a lever ("lever action") or operating a slide ("slide action"), in order to load the next round. Although a semiautomatic firearm does not require a separate step to load the next round into the firing chamber, the semiautomatic is not unique in this regard. In a revolver or a double-barreled shotgun or rifle, the shooter can also fire the next shot as fast as he can squeeze the trigger.

David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 388-89 (1994).

241. *Kasler v. Lungren*, __ P.2d __, 72 Cal. Rptr.2d 260, 273-74 (1998) (holding further that although the add-on provision was unconstitutional, it was possible to sever it from the remainder of the act), *review granted*, 74 Cal. Rptr. 2d 824 (Cal. May 20, 1998).

weapons" which the legislature determined to "pose a significant threat to the health, safety, and security of the citizens of California."²⁴² The legislature based this on their findings that an "assault weapon" has "such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings."²⁴³ First, at the time the act was enacted "assault weapons" were used in only about one percent of all gun crime in California.²⁴⁴ According to a report prepared by the California Department of Justice, and based on data from police firearm laboratories throughout the state, in 1990, "assault weapons" comprised 36 of the 963 firearms involved in homicide or aggravated assault.²⁴⁵ The report concluded that "assault weapons play a very small role in assault and homicide firearm cases."²⁴⁶ "[T]he report, prepared in response to a request by a California State Senator, was suppressed by the California Attorney General's Office, which claimed that the report did not exist. A leaked copy was released to the media."²⁴⁷ Second, the legislative findings are wrong—"assault weapons" do not fire faster and do not have greater ammunition capacity than many other firearms."²⁴⁸ Rather, so-called "assault

242. CAL. PENAL CODE § 12275.5 (1997) (entitled "Legislative findings and declarations").

243. *Id.*

244. David Alan Coia, *Assault Rifles Said to Play a Small Role in Violent Crimes*, WASH. TIMES, June 27, 1992, at A4.

245. *Id.*

246. *Id.* See also David Freed, *Assault Rifles are Not Heavily Used in Crimes*, L.A. TIMES, MAY 20, 1992, at A18 (noting that fifty-eight of the 1,979 guns seized from California narcotics dealers in 1990 were "assault weapons").

247. Kopel, *supra* note 241, at 407.

248. *Id.* at 404. New York University School of Law Professor David Kopel wrote:

If "assault weapons" were actually automatic firearms, such as machine guns, then the claim [that they have a high rate of fire] would clearly be true. With an automatic weapon, if the shooter squeezes and holds the trigger, bullets will fire automatically and rapidly until the trigger is released.

Semiautomatic firearms are . . . not automatic. With a semiautomatic, pressing the trigger fires one, and only one bullet. To fire another bullet, the shooter must release the trigger, and then press it again. Thus, a semiautomatic can shoot only as fast as a person can squeeze the trigger.

Id. at 388 (citations omitted).

A second feature, supposedly unique to 'assault weapons,' is their high ammunition capacity. In fact, most semiautomatic firearms, both banned and nonbanned, store their ammunition in detachable boxes or tubes called 'magazines.' The number of rounds a gun can fire without reloading depends on the size of the magazine, an interchangeable, removable part that can be purchased separately. Thus, ammunition capacity has nothing to do with the gun itself. The magazine, not the gun, is the variable. Any gun that accepts detachable magazines can accept a magazine of any size.

weapons" were banned by the California Legislature for political reasons—because they are military-looking—not because they are any different from other civilian semi-automatics. There is no logical reason why the legislature placed some military-looking civilian semi-automatics on the banned list while others were not. They are all very similar in function and purpose.

Moreover, the provision also fails the second prong because it is not narrowly tailored. The provision is under-inclusive because the act omits from the list of "assault weapons" certain weapons which were functionally indistinguishable from guns on the list, as well as certain weapons that were identical to guns on the list.²⁴⁹ An example noted by the *Kasler* court is:

the Heckler and Kock PSG-1 sniper rifle (listed) fires the standard NATO 7.62 millimeter cartridge (".308 Winchester") and uses a five-round magazine . . . the Communist-bloc Dragunov SVD sniper rifle (not listed) fires "the Russian 7.62 x 54 high power military cartridge" or "the old military 7.92x57 mm., though it may also be, or have been available in .308 Winchester."²⁵⁰

Likewise, the "add-on" provision, by which the Legislature attempted to account for this problem, is also under-inclusive because it is limited in scope and could not be used to add all possible weapons with equal or greater rates of fire and capacity for firepower.

Under the "undue burden" test, the act would also be held unconstitutional as a regulation that has the effect (and very likely the purpose) of placing a substantial obstacle in the path of individuals seeking to exercise their Second Amendment right. The individual's interest at stake here is the exercise of a constitutional right. The state, on the other hand, has no legitimate interest in banning all weapons deemed "assault weapons" when the classification is not based on differences that are real in fact.

Conclusion

As Justice Thomas suggested during the last week of the Court's 1997 term, the time has come for the United States Supreme Court to enter the current debate to "determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of the republic.'"²⁵¹ Likewise, Law Professor Nelson Lund observed: "[i]n the years since

Id. at 390-91 (citations omitted).

249. See *Kasler v. Lungren*, __ P.2d __, 72 Cal. Rptr.2d 260, 273-74 (1998), review granted, 74 Cal. Rptr. 2d 824 (Cal. May 20, 1998).

250. *Id.*

251. *Printz v. United States*, 521 U.S. __, 117 S. Ct. 2365, 2386 (1997) (Thomas, J., concurring).

the incorporation process began, the Supreme Court has refused, without explanation, to address the issue of Second Amendment incorporation. In this respect, the Second Amendment is unique."²⁵² The Court has a responsibility to address questions concerning the nature, scope, and applicability of the rights expressly provided by the Bill of Rights. There is no adequate justification for treating the Second Amendment differently than the rest of the Bill of Rights.

Should the Court conclude, consistent with a textual and historical reading of the amendment, that the amendment was intended to provide *both* a collective and an individual right, the next logical step is for the Court to determine the applicability of the right, namely, whether the amendment applies to state, as well as federal, action.²⁵³ This Note has laid out the Court's current incorporation doctrine and applied it to the Second Amendment. The Author's preference is for the Court to revise completely its current incorporation doctrine, the flaws of which include: the Court's failure to identify *when* the "fundamental right" inquiry is to be made, the Court's interchangeable use of "American scheme of liberty" and "Anglo-American scheme of justice," and the Court's status quo inquiry when interpreting an anti-majoritarian document. Since, however, the Court has made no attempt either to change or to abandon the current doctrine, the Second Amendment must be considered within the existing framework. Under this analysis, there exists a strong case for incorporating the Second Amendment against state action.

The last section of this Note sets forth the author's two proposed tests: (1) a two-prong hybrid test, and (2) an "undue burden" test. The author's tests, as illustrated by their application to California Penal Code section 171(b), demonstrate that a judicially-enforced Second Amendment would not be "fatal in fact" to all gun control legislation.

252. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 49 (1996).

253. Interpretation of the scope of the amendment also includes determining which weapons qualify as "arms." As noted previously, the Court has incorporated rights without fully defining the scope or nature of the right. See note 17, *supra*. In *Duncan v. Louisiana*, for example, the Court concluded that it need not articulate an exact line that determines whether the seriousness of the punishment is enough to require a jury trial. 391 U.S. 145, 162 (1968). Likewise, in order to incorporate the Second Amendment, the Court need not fully define the scope or nature of the right.

